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UNITED STATES BANKRUPTCY COURT

DISTRICT OF OREGON

In re  
Olsen Agricultural Enterprises LLC, an  
Oregon limited liability company,  
Debtor.

Case No. 11-62723-fra11

**STATEMENT OF BACCHUS  
CAPITAL, LP WITH RESPECT TO  
INTERIM ORDER  
(I) AUTHORIZING DEBTOR TO  
OBTAIN POSTPETITION  
SECURED FINANCING,  
(II) GRANTING ADEQUATE  
PROTECTION TO PREPETITION  
SECURED PARTIES AND  
(III) SCHEDULING A FINAL  
HEARING**

Bacchus Capital, LP, ("Bacchus"), the proposed postpetition lender to Debtor,  
provides this Statement to accompany Debtor's motion for an order amending (the "Motion  
to Amend") the Interim Order (I) Authorizing Debtor to Obtain Postpetition Secured  
Financing, (II) Granting Adequate Protection to Prepetition Secured Parties and  
(III) Scheduling a Final Hearing entered herein on June 16, 2011 (the "Interim Financing

Order”) [Dkt. #79] and to elucidate the legal, business and practical reasons that support the amendments to the Interim Financing Order requested by Debtor and Bacchus.<sup>1</sup>

**A. RECITAL G: GOOD FAITH AND THE PROTECTIONS OF SECTION 364(E)**

1. Leading up to Debtor’s bankruptcy filing on June 1, 2011, Bacchus, Debtor and their respective attorneys and advisors engaged in extensive negotiations concerning the provision by Bacchus of debtor-in-possession financing to Debtor. The negotiations culminated in the Preliminary Indicative Term Sheet executed by the parties on May 27, 2011 (the “Term Sheet”). Debtor’s motion for interim and final debtor in possession financing (the “DIP Motion”) [Dkt #34] stated that the negotiations between the parties were at arm’s length and in good faith. *See*, DIP Motion ¶ 10. This statement in the DIP Motion was buttressed by the testimony of Clyde A. Hamstreet at the hearing before the Court on Monday, June 13 (the “Interim Hearing”). Mr. Hamstreet testified that the Term Sheet was negotiated by all parties at arm’s length and in good faith. Mr. Hamstreet also testified that there were no feasible alternatives to the postpetition financing offered by Bacchus and that Mr. Hamstreet believed Debtor’s entry into the Term Sheet and the proposed financing to be a sound exercise of its reasonable business judgment. No party at the Interim Hearing, including Debtor’s prepetition lender Rabo Agrifinance, Inc., cross-examined Mr. Hamstreet with respect to such testimony.

2. The findings contained in Recital G, which were stricken by the Court in the Interim Financing Order, simply memorialize the statements by Debtor in the DIP Motion and the direct testimony provided by Mr. Hamstreet at the Interim Hearing. The good faith finding is integral to the protections afforded a debtor-in-possession lender as it is the foundation for the protections embodied in subsection (e). Absent the protection of

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<sup>1</sup> Except as noted herein, Bacchus fully understands and does not seek to disturb any of the Court’s other interlineations to the Interim Financing Order.

1 section 364(e), if the Court's authorization for Debtor to obtain postpetition financing were  
 2 reversed or modified on appeal (and no stay pending appeal), Bacchus would be vulnerable  
 3 to the subsequent elimination of its lien and/or priority with respect to any interim advance it  
 4 made to Debtor.<sup>2</sup> This is not a risk that Bacchus is willing to bear.

5 **B. OTHER REQUESTED AMENDMENTS TO THE INTERIM**  
 6 **FINANCING ORDER**

7 1. The economic terms of the postpetition loan facility contemplated by  
 8 the Term Sheet were predicated upon certain negotiated protections that Bacchus would  
 9 receive under the interim and final orders approving such postpetition financing. It was for  
 10 this reason that the Term Sheet required the form of the interim and final order to be  
 11 "reasonably satisfactory" to Bacchus. If such protections are not available to Bacchus, the  
 12 economic terms upon which Bacchus is prepared to provide the DIP Loan to Debtor may  
 13 need to be adjusted to account for increased risk. Certain of these risks are highlighted  
 14 below. As Bacchus views this as an integrated transaction, it is not prepared to fund on the  
 15 terms contained in the Interim Financing Order and has so advised Debtor.

16 **i. Paragraph 13: Protection Against Marshaling**

17 2. The Motion to Amend requests that the Court amend paragraph 13 of  
 18 the Interim Financing Order by adding the sentence that was stricken on page 20 and which  
 19 reads "The DIP Lender shall not be subject in any way whatsoever to the equitable doctrine  
 20 of 'marshaling' or any similar doctrine with respect to the Collateral." In Oregon, it has been  
 21 defined as a "basic principle of equity that where a senior creditor has recourse to two funds  
 22 and a junior creditor has recourse to but one of them, the senior creditor must seek to satisfy  
 23

24 <sup>2</sup> "§ 364(e) prohibits not only outright invalidation of a lien or priority where the challenging  
 25 party has failed to seek a stay, but also modification of the terms of a post-petition lender's  
 26 bargained-for collateral." *Boullioun Aircraft Holding Co., Inc. v. Smith Management (In re Western Pacific Airlines, Inc.)*, 181 F.3d 1191, 1195 (10<sup>th</sup> Cir. 1999); *Burchinal v. Central Wash. Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484 (9<sup>th</sup> Cir. 1987) (same).

1 itself first out of the fund in which the junior creditor has no interest.” *Community Bank v.*  
 2 *Jones*, 278 Or. 647, 678, 566 P.2d 470, 488 (1977). When successfully invoked, marshalling  
 3 dictates the order in which a creditor may proceed with respect to its bargained-for collateral.  
 4 Here, the successful invocation of the marshalling doctrine following an Event of Default by  
 5 Debtor under the DIP Loan and the grant of relief from stay by the Court after notice and  
 6 hearing, might cause Bacchus to bear substantial delay and legal costs in enforcing its rights  
 7 with respect to its collateral. Among other things, Bacchus might be forced to recover first  
 8 from illiquid and unencumbered (or less encumbered) collateral before it could proceed  
 9 against other more easily liquidated collateral. Given these concerns, it is not uncommon in  
 10 the context of debtor-in-possession financing for a bankruptcy court to relieve a DIP lender  
 11 from the specter of marshalling in an order authorizing postpetition financing. *See, e.g., In re*  
 12 *Associated of Los Angeles*, 2010 WL 4739503 at \*7 (Bankr. C.D. Cal. 2010). It is for these  
 13 reasons that Bacchus has requested that it not be subject to the doctrine of marshalling.

14 ii. **Paragraph 14: The Ability to File Mortgages, Financing**  
 15 **Statements and Other Instruments**

16 3. The Motion to Amend further requests that the language contained in  
 17 paragraph 14(b) be reinserted into the Interim Financing Order. Paragraph 14(b) simply  
 18 allows Bacchus (and the Existing Secured Creditors) to file mortgages, financing statements,  
 19 and notices of lien with respect to the perfection of its liens. Paragraph 14(a) provides that  
 20 the DIP Liens and the Adequate Protection Liens “shall be perfected by operation of law  
 21 immediately upon entry of this Interim Order,” and that Bacchus and the Existing Secured  
 22 Creditors shall not be *required* to file the typical instruments to perfect such liens.  
 23 Notwithstanding such provisions in DIP orders and cash collateral orders, secured creditors  
 24 often request bankruptcy court authorization to file the typical instruments of perfection. The  
 25 purpose of such relief is straightforward. It allows a creditor to record the typical instruments  
 26 of perfection that are typically reviewed, understood and relied upon by parties other than the

1 bankruptcy court, such as title companies, recording offices and non-bankruptcy courts.  
 2 Often, this is a more practical protection to a postpetition lender who, unlike a debtor's  
 3 prepetition secured creditors, has no existing instruments of perfection recorded or on file.  
 4 As this provision is entirely permissive, and does not place a burden on Debtor, it is not  
 5 prejudicial to Debtor's estate. In contrast, the absence of this provision is prejudicial to  
 6 Bacchus.

7                   iii.       **Paragraph 27: Use of the Carve-Out, Collateral and DIP Proceeds**  
 8                               **to Obtain Postpetition Financing from Another Party**

9                   4.       The Motion to Amend requests that the Court amend paragraph 27 of  
 10 the Interim Financing Order to reinsert subsection (a) which was stricken on page 31 and  
 11 reads "request authorization to obtain postpetition loans or other financial accommodations  
 12 pursuant to Bankruptcy Code section 364(e) or (d), or otherwise, other than from DIP  
 13 Lender." Based upon its interest in Debtor's business, Bacchus has devoted significant time  
 14 and energy to negotiating and seeking approval of a postpetition loan that provides Bacchus  
 15 with a meaningful lending transaction and allows Debtor to continue to operate during its  
 16 Chapter 11 case and to swiftly promulgate a plan of reorganization that will either by  
 17 acceptable to Bacchus or remove Bacchus from the equation by satisfying the DIP  
 18 Obligations in full upon the effective date of such plan. In light this strategic objective,  
 19 Bacchus seeks to prevent the proceeds of its loan and collateral from being used by Debtor in  
 20 the mere effort to locate new DIP financing and deprive Bacchus of its bargained-for benefit.  
 21 While Bacchus well understands that its seat at the table ultimately may be displaced, it  
 22 should not be compelled to finance such efforts, particularly if they are unsuccessful. Of  
 23 course, if such efforts are successful, then the product of those efforts—the replacement  
 24 loan—can fund the costs of such efforts. Accordingly, the estate is not prejudiced by the  
 25 language Bacchus requests.  
 26

5. Additionally, in light of the deletion by the Court of the phrase “any transaction, occurrence, omission, or action, including, without limitation” in paragraph 27 on page 31 of the Order, the Motion to Amend seeks amendment of subsection (II) to add the term “DIP Obligations” and thereby read “any action seeking to invalidate, set aside, avoid or subordinate, in whole or in part, the **DIP Obligations and/or** DIP Liens” and to amend subsection (III) to add the term “DIP Obligations” and thereby read “any action that has the effect of preventing, hindering or delaying (whether directly or indirectly) the DIP Lender’s assertion, enforcement or realization on the Collateral and **DIP Obligations** in accordance with the DIP Loan Documents or this Interim Order. This requested change is in the nature of a clarification that ensures that Bacchus is protected with respect to the enumerated actions both with respect to the DIP Liens and the DIP Obligations. To effectuate this objective and to maintain consistency, Bacchus simply requests that the term “DIP Obligations” be added to subsections (II) and (iii).

WHEREFORE, Bacchus requests entry of an order granting the relief requested in the Motion to Amend and such other and further relief as is appropriate.

DATED: June 17, 2011.

TONKON TORP LLP

By /s/ Albert N. Kennedy

Albert N. Kennedy, OSB No. 821429  
Attorneys for Debtor

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **STATEMENT OF BACCHUS CAPITAL, LP WITH RESPECT TO INTERIM ORDER (I) AUTHORIZING DEBTOR TO OBTAIN POSTPETITION SECURED FINANCING, (II) GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED PARTIES AND (III) SCHEDULING A FINAL HEARING** on the parties indicated as "ECF" on the attached List of Interested Parties by electronic means through the Court's Case Management/Electronic Case File system on the date set forth below.

DATED this 17th day of June, 2011.

TONKON TORP LLP

By /s/ Albert N. Kennedy

Albert N. Kennedy, OSB No. 821429  
Attorneys for Debtor

**LIST OF INTERESTED PARTIES**

***In re Olsen Agricultural Enterprises LLC***  
**U.S. Bankruptcy Court Case No. 11-62723-fra11**

**ECF PARTICIPANTS:**

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